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Supreme Court of the United States

No. 1166 October Term, 1966

H. T. JORDAN, JR., and GERVASE A. BRYANT,

Petitioners,

VERSUS

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

HOWARD K. BERRY, JR.
626 Cravens Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioners

JUDD L. BLACK
335 Oklahoma Natural Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioners

King Law Brief COMMERCE EXCHANGE BLDG., OKLAHOMA CITY — CE 5-2909

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Supreme Court of the United States

No. ----------, October Term, 1966

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Petitioners,

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UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

Petitioners, H. T. Jordan, Jr. and Gervase A. Bryant, by their counsel, pray that a writ of Certiorari issue to review the judgement of the United States Court of Appeals Tenth Circuit, affirming the judgment of the United States District Court for the Western District of Oklahoma.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the United States Court of Appeals Tenth Circuit is appended hereto and is officially reported in 370 F2d 126.

JURISDICTION

The judgment of the United States Court of Appeals Tenth Circuit was made and entered on December 5, 1966. A petition for a rehearing was denied by an order entered on Jaunary 26, 1967. On January 31, 1967, an order was made and entered staying the issuance of mandate, pending the filing, consideration and disposition of this petition, and further, granting these petitioners thirty (30) days time in which to file their petition for a writ of certiorari. That thereafter this Court entered an order, on February 20, 1967, extending the time to file their petition for certiorari to and including March 27, 1967. That petitioners invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Where there has been a plain denial to the accused, as contended in the instant case, of the right to be confronted with the witnesses against them at the trial, does this raise a constitutional question of such grave interest and importance that this Court would review the judgment of the lower court?

2. In a constitutional sense, is it not imperative that, as a basis for a fair trial by a jury in a criminal case, the only evidence to be developed against the accused shall come only from witnesses sworn and examined in a public courtroom, where there is full judicial protection of the defendant's constitutional guarantee of confrontation and cross-examination by counsel?

3. Where petitioners, in their petition for a rehearing, for the first time on appeal, did call to the attention of the appellate court that they had been denied the right of confrontation, would this negate any claim that they had waived this constitutional guarantee?

4. Where, as in the instant case, the proceedings in the lower courts had permitted "hearsay evidence" to be considered by the jury as basis for its verdict, would this be such a departure from the accepted and usual course of procedure that this Court should grant certiorari to review the judgments of the lower courts?

5. Is Title 18 U.S.C. 1010 unconstitutional because it failed to clearly identify with certainty the entity sought to be named therein, as being an agency of the United States of America?

6. Is Title 18 U.S.C. 1010 unconstitutional because the provisions of this statute are too vague and too ambiguous, in that the provisions of the statute are absent of any clear cut definition of the wrongful design necessary to form the criminal intent to commit the prohibited offense, thereby permitting the innocent conduct and lawful intent of a person to be declared equally guilty with the wrongdoer with fraudulent and unlawful intent?

STATUTES INVOLVED

TITLE 18 U.S.C. 1010:

> "Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extention or renewal of any loan, advance or credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance or credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 751.

TITLE 28 U.S.C. Rule 52 (b):

> "Plain error or defects affecting substantial rights may be noticed although they are not brought to the attention of the court."

CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT:

Pertinent provisions as follows:

> "• • • Congress shall make no law • • • abridging the freedom of speech • • •"

FIFTH AMENDMENT:

Pertinent provisions as follows:

"• • • nor be deprived of life, liberty, or property, without due process of law • • •"

SIXTH AMENDMENT:

Pertinent provisions as follows:

"• • • and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him • • •"

STATEMENT

Petitioners were convicted by a jury, on a plea of not guilty, in the United States District Court for the Western District of Oklahoma, on December 9, 1966, on three counts of a twelve count indictment. That Count One, on which they were convicted, charged them with a conspiracy to violate Title 18 United States Code, Section 1010; that Count Six, on which they were convicted, charged them, in substance, with making a false statement to the Federal Housing Administration, an agency of the United States of America, in violation of Title 18 U.S.C., Sections 1010 and 2; that Count Ten, on which they were convicted, charged them, in substance, with having made a false statement to the said Federal Housing Administration, an agency of the United States of America, in violation of said last named sections of said statute; all of which is set forth in detail in the opinion appended hereto and in the nine printed copies

of the record filed in the office of the clerk, pursuant to Rule 21 Paragraph 4 of this Court.

These petitioners were business men engaged in building dwelling units and selling them for homes, under the firm name of Beacon Realty Company. That some of the purchasers borrowed money from local financial institutions, who obtained loan guaranties of the Federal Housing Administration, upon the application of the purchasers.

The indictment does not charge any of these local financial institutions, nor any of the purchasers of these dwelling units, as co-conspirators with these petitioners.

Fourteen overt acts were alleged in the indictment to support the conspiracy count, although none of said acts were wrongful or criminal in themselves.

Count Six charges that Homer H. Hill, Jr. and Thelma Joyce Hill purchased real estate located at 1929 Symphony Lane, Midwest City, Oklahoma, on or about the 13th day of January, 1960, and that petitioners, for the purpose of influencing the Federal Housing Administration, an agency of the United States of America, to insure a loan by the American Mortgage and Investment Company, to the said Homer H. Hill, Jr. and Thelma Joyce Hill, did knowingly and wilfully make, pass, utter and publish and cause to be made, passed, uttered and published to the said Federal Housing Administration, a false statement, namely: that Hill made $7200.00 annually. Whereas, it was alleged, that he made less than $7200.00 annually. (R. 22-34, 74-78).

That Count Ten of the said indictment charged that on or about the 31st day of March 1960, the petitioners, for the purpose of influencing the Federal Housing Administration, an agency of the United States of America, to insure a loan by the Midwest Mortgage Company, Oklahoma City, Oklahoma, to Thomas F. and Winona Jackson, in connection with their purchase of real estate located at 9413 Rhythm Road, Midwest City, Oklahoma, did knowingly and wilfully make * * * and cause to be made * * * to the Federal Housing Administration, false statements, namely: that purchasers intended to trade their equity in certain property and to occupy the premises so purchased, and that said alleged statements were untrue, and that they did not intend to trade their equity or occupy the property; all of which was alleged to be in violation of Title 18 U.S.C. 1010 and 2. (R. 34-46, 114-121)

That during the course of the trial certain "hearsay" testimony was heard and considered by the jury, as a basis for their verdict, without the petitioners coming face to face with their accusers, and without opportunity to cross-examine these witnesses, as for instance, witness for the prosecution Bruce D. Miller, being examined in chief by government prosecutor, Jack R. Parr: (R. 18, 19)

"Q. Explain the communications from the Oklahoma National Mortgage Company. What did they pertain to?

MR. HARRIS: Object to that as incompetent, irrelevant and immaterial. It would not be binding on us.

THE COURT: What is the point Mr. Parr?

MR. PARR: I will approach the bench and state it off the record if you like.

THE COURT: Very well.

(Conference at bench between court and respective counsel, off the record, and open proceedings resumed as follows:)

THE COURT: Overruled

Q. (By Mr. Parr) Did anybody from the Oklahoma National Mortgage Company come out to see you with reference to 1817 Melody Drive property?

A. They called me on the telephone.

Q. What did they say to you?

A. They said the payments were three months behind and if the payments were not brought up to date they were going to start foreclosing proceedings. I made up the points on it, and Mr. O'Toole of the Oklahoma National Mortgage Company suggested that I try to get the deed straightened out, and he gave me a list of the deeds he needed to get it brought up to date and I got them all, made the payments, and the next day he called me and said there was one deed I got when I cleaned this up. He said the deed I gave the Beacon Realty Company had been put up for an $1800.00 loan, and if I would pay the $1800.00 he would give me a clear deed to the property."

Again, on pages 40 and 41 of the printed record, government witness Thomas Franklin Jackson, testifying in chief:

(By Mr. Parr)

"Q. Did you know Mr. Warrington of the Midwest Mortgage Company?

A. Yes, sir.

Q. Did he come to see you?

A. Yes, sir.

Q. What did he say?

A. He asked me if I owned 9413 Rhythm Road and I told him about this equity and I signed the deed over to them, and it was supposed to have been cleared as far as I was concerned.

Q. Did he tell you anything about the 9413 property?

A. Yes.

Q. What did he say?

A. That there was two payments due on this property, and I had a very short period of time to make these two payments or it would go into the hands of the FHA.

Q. Did he mention anything about you living in the property?

A. Yes, sir.

Q. What did he tell you about that?

A. He was rather astounded by the fact I wasn't living in the property and told me I should move in."

Counsel, on appeal, did not urge in his brief in the appellate court this alleged violation of the petitioners constitutional right of "confrontation" with the witnesses against them at the trial. However, in a timely petition for a rehearing, new counsel did raise this denial of a fundamental constitutional right and did call this plain error to the attention of the court and gave the lower appellate court an opportunity to take corrective action. (TR 5)

Count 1 alleges a conspiracy to make false statements which are alleged in Counts 2, 3, 4, 5, 7, 8, 9, 11 and 12. All of these above named counts, except the conspiracy count, are not involved in the instant case, since the petitioners were found not guilty on these nine counts of the indictment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In the very beginning, we wish to point out to the Court that a very grave constitutional violation has occurred to these petitioners, in that they were deprived of their constitutional right of "confrontation" with witnesses against them at the trial.

This constitutional guarantee is anchored in the Sixth Amendment to the United States Constitution, which clearly provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. This very important constitutional right was violated in prosecuting this criminal case against these petitioners, and "hearsay evidence" was considered against them as a basis for the verdict of guilty.

The decision of the lower appellate court, affirming their conviction, should be reviewed, because the actions of the lower courts were a very serious departure from the accepted and usual course of judicial proceedings.

It is further pointed out that the decision of the lower appellate court, in affirming the judgment of conviction in the lower court against these petitioners, decided a federal question, the "right of confrontation" and the "right of cross-examination" in a way that is in conflict with the decisions of this Court.

This Court has consistently held that the constitutional right of confrontation means that the accused has the right to come face to face with his accusers at the trial, as well as the right of cross-examination of the witnesses against him. In the very recent case of *Pointer v. State of Texas*, 380 US 400, 85 S Ct 1065, 13 L ed 2d 923, which is an applicable case, this Court reaffirmed these basic constitutional rights, and we quote from the body of the decision, beginning on page 403 of the U.S. Supreme Court Reports, as follows:

> "'We hold today that the Sixth Amendments right of an accused to confront the witnesses against him is likewise a fundamental right • • • It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, e.g., 5 Wigmore, Evidence § 1367 (3d ed 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the

decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in *Kirby v. United States*, 174 US 47, 55, 56, 43 L ed 890, 893, 894, 19 S Ct. 574, referred to the right of confrontation as '(o)ne of the fundamental guarantees of life and liberty,' and 'a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constituiton of the United States and in the constitutions of most if not of all the States composing the Union.' Mr. Justice Stone, writing for the Court in *Alford v. United States*, 282 US 687, 692, 75 L ed 624, 628, 51 S Ct 218, declared that 'the right of cross-examination is 'one of the safeguards essential to a fair trial.' And in speaking of confrontation and cross-examination this Court said in *Greene v. McElroy*, 360 US 474, 3 L ed 2d 1377, 79 S Ct 1400:

> 'They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion.' 360 US, at 496-497, 3 L ed 2d at 1391 (footnote omitted).

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In *In re Oliver*, 333 US 257, 92 L ed 682, 68 S Ct 499, this Court said:

'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333 US, at 273, 92 L ed at 694 (footnote omitted).

"And earlier this Term in *Turner v. Louisiana*, 379 US 466, 472-473, 13 L ed 2d 424, 429, 85 S Ct 546, we held:

'In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.'

"Compare *Willner v. Committee on Character & Fitness*, 373 US 96, 103-104, 10 L ed 2d 224, 229, S Ct 1175, 2 ALR3d 1254."

• • •

"(4, 5) Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him. See, e.g., *Dowdell v. United States*, 221 US 325, 330, 55 L ed 753, 757, 31 S Ct 590; *Motes v. United States*, 178 US 458, 474, 44 L ed 1150, 1156, 20 S Ct 993; *Kirby v. United States*, 174 US 47, 55-56, 43 L ed 890, 893, 894, 19 S Ct 574; *Mattox v United States*, 156 U.S. 237, 242-243, 39 L ed 409-411, 15 S Ct 337. *Cf. Hopt v. Utah*, 110 US 574, 581, 28 L ed 262, 265, 4 S Ct 202; *Queen v. Hepburn*, 7 Cranch 290, 295, 3 L ed 348, 349."

Mr. Justice Stewart, concurring in the result, on page 410, stated:

> "The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is '(o)ne of the fundamental guaranttees of life and liberty,' and 'one of the safeguards essential to a fair trial.' It is, I think, as indispensable an ingredient as the 'right to be tried in a courtroom presided over by a judge.' Indeed this Court has said so this very Term. *Turner v. Louisiana*, 379 US 466, 472-473, 13 L ed 2d 424, 428-429, 85 S Ct 546."

In *Douglas v. Ala.*, 380 US 415, 85 S Ct 1074, 13 L ed 2d 934, the Court, in the seventh paragraph of the Syllabus, held:

> "7. An objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to preserve the claim for review in the United States Supreme Court."

It is pointed out that, over timely objections, the trial court permitted a government witness, a Mr. Bruce D. Miller, to testify to a detailed conversation held over the telephone with some third party, identified by the witness only as a Mr. O'Toole (R. 19). This purported telephone conversation was rank "hearsay evidence" of the most vicious kind, and was highly prejudicial to these petitioners, because the absent and unsworn witness O'Toole, accused these petitioners of an offense other than the offenses named in the indictment,

namely: That these petitioners had put up a deed for a loan for $1800.00, and that it would be necessary for witness Miller to pay the $1800.00 before he could get a clear deed to this property – meaning the property at 1817 Melody Drive, which petitioners had previously sold to Miller. (R. 16-22)

It is seriously urged that these "hearsay statements" were deliberately provoked by the prosecuting attorney at the trial. That these purported facts recited in these various telephone conversations with some third party, were definitely uncommunicated to and unauthorized by these petitioners. That there can be no doubt about these "hearsay statements" being purposely calculated to and did create actual prejudice and bias in the minds of the jury against these petitioners. This prejudicial "hearsay evidence" certainly prevented them from having that fair trial that is the goal in a federal court of justice. The right to confront their accusers face to face was denied to these petitioners. Their right of cross-examination of government witnesses Mr. Warrington (R. 40-41) and Mr. O'Toole (R. 18-19), was denied to these petitioners; yet the jury was allowed to consider the unsworn statements of these witnesses against these petitioners and to use this "hearsay evidence" as a basis for their verdict.

This Court, *In Re Murchison*, 349 US 133, 75 S Ct 623, held, in paragraphs 6 and 9 of the syllabus, as follows:

"6. To perform its high function in the best way, justice must satisfy the appearance of justice." Citing the case of *Offutt v. US*, 348 US 11, 75 S Ct 11.

"9. A defendant's right to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized."

These decisions above cited are applicable to the instant case, and they are strongly persuasive on the points of law involved. Therefore, petitioners have clearly established their right to have this Court consider, on review of the decision of the appellate court affirming the judgment of the lower court, these very important constitutional questions of vital public interest.

Next, your petitioners challenge the constitutionality of Title 18 U.S.C. 1010, on these basic grounds:

(1) This statute is believed to be fatally defective and invalid because the provision of this statute do not clearly and understandingly identify the entity, or subject matter, sought to be protected by the enactment of the statute, the entity which in the statute is variously referred to as the "Federal Housing Administration" or simply "Administration". There is positively no provision whatsoever in the statute defining this entity to be an "agency of the United States of America", or any other description or provision stating that the United States has even a proprietary interest in the subject matter thereof. The government has attempted to circumvent this deficiency of the provisions of said statute in drafting

the indictments in question, because in Count 1, Count 6, and County 10, (R. 1, 5 and 8) it is charged in each instance that the subject matter of the said statute is "an agency of the United States of America".

We urge that this fact alone is certainly self-evident that the statute is deficient and invalid because it is too vague and too ambiguous to measure up to constitutional requirements. If this were not true, why was it necessary for the prosecution, in drafting the indictment, to go beyond the language of this statute and charge these petitioners in Count 1, Count 6 and Count 10, with language not found within the four corners of the statute, such as the added language, to wit: "An agency of the United States of America"?

Therefore, the statute and the offenses charged against these petitioners is clearly unconstitutional in that the indictment does not "track" the pertinent language of the statute, and by reason thereof the decision of the appellate court affirming the trial court's judgment of conviction of the petitioners should be reviewed.

(2) This statute is believed to be clearly unconstitutional because the provisions of the statute are too ambiguous in that the provisions of the statute are absent of any clear cut, intelligent and understandable definition of the wrongful design necessary to form the criminal intent to commit the prohibited offense; thereby permitting innocent opinion and lawful intent of a person to be declared equally guilty with the wrongdoer with a fraudulent and unlawful intent.

Compare the inadequate provisions of 18 U.S.C. 1010 with pertinent and valid provisions of 18 U.S.C. 1002, which clearly state the offense and defines the necessary intent, as follows:

> "Whoever knowingly and with intent to defraud the United States or any agency thereof • • •"

By comparing these two statutes, it becomes apparent that Title 18 U.S.C. 1010 is also an unconstitutional abridgment of speech, since the expression of an opinion by the petitioners has subjected them to a criminal prosecution. Likewise, the said statute is an unconstitutional abridgement of petitioners' right to be fully informed as to the exact nature of the offense against them, within the language of the statute, thereby violating their constitutional right as guaranteed to them in the Sixth Amendment.

The word "unconstitutional" as understood by the courts, means that the act assailed is in conflict with some provision of the Constitution; not that it is contrary to sound principles of legislation. *Ketterer v. Lederer*, 269 F 153.

In *Norton v. Shelby Co.*, 118 US 425, 6 S Ct 1121, it was held:

> "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is in legal contemplation as inoperative as though it had never been passed • • •"

In *United States v. Hariss*, 347 US 612, 74 S Ct 808, this Court, in the second paragraph of the syllabus, held:

> "2. The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, the underlying principle being that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

In *Jordan v. DeGeorge*, 341 US 223, 230, 232, 71 S Ct 703, 707, 708, 95 L ed 886, it was held:

> "The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their act."

We seriously submit for the consideration of the Court, that these vague and ambiguous provisions of this statute are in such loose and broad terms and so all inclusive, that the statute wrongfully invades the domain of free speech and thereby violates even the First Amendment, which provides that "Congress shall make no law * * * abridging the freedom of speech * * *" The provisions of this statute could very well easily ensnare a person who has done no wrong other than to exercise his constitutional right of free speech to express an opinion. Therein is the difficulty, and a difficulty which is insuperable, because the statute appears to be too all inclusive and would make it criminal to express one's opinion as to the value of a security, or the value of an asset,

or even an estimate of the contemplated annual income of an individual, which is a factual situation in the instant case.

Therefore, it is urged that the statute abridges the freedom of speech. In *Conally v. General Construction Co.*, 269 US 385, 391, 46 S Ct 126, 70 L Ed 322, the test of vagueness was said to be that where the statute in question either forbids or requires the doing of an act in terms so vague that it must be said that men of common intelligence must necessarily guess at its meaning and differ as to its application. Therefore, this statute fails to meet the constitutional requirements of due process of law. See *United States v. Petrillo*, 332 US 1, 67 S Ct 1538, 91 L Ed 1877, to the same effect.

It was stated in *Lanzetta v. New Jersey*, 306 US 451, 59 S Ct 618, 83 L Ed 888, as follows:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it * * * It is the statute, not the accusation under it, that prescribed the rule to govern conduct and warns transgression * * * No one may be required at peril of life, liberty or property to speculate as to the meaning of a penal statute. All are entitled to be informed as to what the state commands or forbids."

To the same effect, see: *Winters v. New York*, 333 US 507, 515, 68 S Ct 665, 670, 92 L Ed 840; *Thomas v. Collins*, 323 US 516, 65 S Ct 315, 89 L Ed 430; *Cantwell v. Connecticut*, 310 US 296, 60 S Ct 900, 84 L Ed 1213.

CONCLUSION

In conclusion, we think that it has been made clear that these petitioners were positively deprived of their constitutional rights of "confrontation" and "cross-examination" of witnesses against them at their trial. There could be no doubt but what this hearsay evidence of these government witnesses purporting to recite various hearsay conversations had over the telephone, or otherwise, with third parties, was highly prejudicial, because these purported statements even accused these petitioners of a serious criminal offense, other than that for which they were on trial. As for instance, O'Toole accused the petitioners of putting up a deed – (meaning to premises at 1817 Melody Drive, which had previously been sold to Miller by petitioners) – for a loan of $1800, and that unless Miller paid the $1800, he could not get a clear deed to this property. (R. 19)

Notwithstanding the above accusation being a fantasy, nevertheless it was a serious and prejudicial charge that could poison the minds of the jury against the accused.

The decisions cited support the contention that these petitioners had a strong constitutional right to confront and to cross-examine the witnesses against them at the trial. This right was positively violated. This denial of confrontation was such a departure from the accepted and usual course of procedure that this Court should grant certiorari to consider these constitutional questions on review of the judgments of the lower courts.

It is further urged that the decision of the lower appellate court in affirming the judgment of the trial court, has decided a federal question, the "right of confrontation", in a way that is contrary to the decisions of this Court and in direct conflict with the applicable decisions herein cited, and calls for this Court to exercise its power of supervision over the lower courts. Rules of the Supreme Court, Title 28 U.S.C. Rule 19.

It has been clearly established that Title 18 U.S.C. 1010 does not measure up to the constitutional requirements as set forth in the decisions cited in this petition.

We urge the Court to grant the writ of certiorari so that the Court may consider these grave constitutional questions, in reviewing the decision of the appellate court in affirming the judgment of conviction in the trial court.

Respectfully submitted,

H. T. JORDAN, JR. and
GERVASE A. BRYANT
Petitioners

HOWARD K. BERRY, JR.
626 Cravens Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioners

JUDD L. BLACK
335 Oklahoma Natural Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioners

APPENDIX

1. Decision of the United States Court of Appeals Tenth Circuit, affirming the judgment of the United States District Court for the Western District of Oklahoma

Filed, United States Court of Appeals, Tenth Circuit,

Dec. 5, 1966, Robert B. Cartwright, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1966

No. 8450

H. T. JORDAN, JR., Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

No. 8451

GERVASE A. BRYANT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Carmon C. Harris of Oklahoma City, Oklahoma for Appellants.

Michael C. Stewart, Assistant U.S. Attorney, Oklahoma City, Oklahoma, (B. Andrew Potter, U.S. Attorney, Oklahoma City, Oklahoma, with him on the brief), for Appellee.

Before PHILLIPS and HICKEY, Circuit Judges, and BRATTON, District Judge.

BRATTON, District Judge.

III

H. T. Jordan, Jr., and Gervase A. Bryant were convicted on three counts of a twelve count indictment. Count 1 charged a conspiracy to knowingly make or cause to be made false statements to the Federal Housing Administration for the purpose of obtaining loans, in violation of Title 18 U,S.C. Sec. 371, and Counts 6 and 10 charged substantive counts of making or causing to be made, false statements to the Federal Housing Administration, in violation of Title 18 U.S.C. Sections 1010 and 2. Of the remaining nine counts, two were withdrawn from the consideration of the jury and not guilty verdicts were returned as to the others. Following conviction and sentencing defendants appeal.

Defendants were builders and sellers of homes, the purchases of which were financed by lending institutions upon loan guaranties of the Federal Housing Administration. Count 1 charges that the defendants conspired among themselves and with others to make or cause to be made false statements to the Federal Housing Administration, knowing such statements to be false. Fourteen overts acts were alleged under this count. Count 6 charges that the defendants made or caused one Hill to make a false statement as to the income of Hill in that it was represented that Hill was employed by the defendants' organization at an annual salary of $7,200.00, and that such false statement was made for the purpose of influencing the Federal Housing Administration to insure the loan on certain property. Count 10 charges that the defendants caused one Jackson to make statements to the Federal Housing Administration to the effect that he was trading his equity in certain property as a part payment on property which he claimed he was purchasing from the defendants and that he intended to occupy such property being puchased from the defendant; on appeal is that the evidence was insufficient to support the findings of guilty as to the three counts. Defendants urge that the evidence is insufficient to support the guilty verdicts as to the two substantive

counts, and that the defendants cannot be found guilty as to the conspiracy count since there was no direct evidence of the conspiracy and the only evidence offered was that which went to prove the substantive counts. They urge that if the defendants were found not guilty of all substantive counts charging offenses which the defendants were alleged to have conspired to commit they could not be guilty of the conspiracy, and particularly so when the Government relies upon the same evidence to prove the conspiracy and the substantive counts.

There is substantial evidence to sustain the verdicts of guilty by the jury as to the two substantive counts. As to Count 6, a finding by the jury that the statement that Hill was drawing a salary of $7,200.00 a year was false is clearly supported by the evidence. It is abundantly clear that during the several months he was employed by the defendants Hill drew no salary at all and at most may have earned in commissions $800.00. As to Count 10, Jackson testified that the defendants proposed to him that the house could be bought in his name and then transferred as an equity to someone else and that he never intended to move it. The reason he went along with the proposal was at the time the only source of income that he had was doing work for the defendants and he was afraid to say no to the proposition. This was more than sufficient to support the jury's finding of guilty on this count.

The gist of a criminal conspiracy is an agreement to violate a law of the United States and one or more overt acts by one or more of the conspirators to effect the objects of the unlawful agreement. The requisite overt act need not be substantive offense which is the object of the conspiracy. Indeed, it need not in itself be wrong. While intent to commit a substantive offense is an essential ingredient of the crime of conspiracy, the offenses are separate and distinct and proof of one is not necessarily proof of the other. *Carter v. United States,* 10 Cir., 333 F.2d 354.

The proof necessary to support a conviction for conspiracy is necessarily not direct. The nature of the offense and the secrecy involved require that the elements of the crime be established by circumstantial evidence, and the common purpose or plan may be inferred from the development or the combination of circumstances. *Baker v. United States*, 10 Cir., 329 F.2d 786; *Dennis v. United States*, 10 Cir., 302 F.2d 5; *O'Neal v. United States*, 10 Cir., 240 F.2d 700.

An appellate court does not weigh evidence in a criminal case but determines whether there is substantial evidence to support the verdict. *Wilder v. United States*, 10 Cir., 100 F.2d 177; *Seefeldt v. United States*, 10 Cir., 183 F.2d 713. There was evidence from which the jury could infer the agreement to knowingly make and cause to be made false statements to the Federal Housing Administration, and there was clear, and in many cases uncontradicted, evidence of the overt acts. Considering the evidence in the light most favorable to the appellee, there is substantial evidence to support the verdict as to the conspiracy count.

The defendants claim that the court considered an improper matter at sentencing. The record reflects that the court made this statement at sentencing:

> "Well, the Court has of course considered this case very carefully. At the same time Mr. Bryant was charged and plead, Mr. Jordan's brother did, too, and as developed in the evidence, Mr. Jordan's brother — not from the evidence but in the evidence — Mr. Jordan's brother was the lumberman furnishing H. T. Jordan materials to build these houses.
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> "Also in the previous case, Mr. Jordan's brother was fined $3,000 for the same offenses or, yes, I

> guess it was the same offense, and Mr. Bryant was fined $1,000. They were not placed on probation and they took the payment of the fine very lightly."

It cannot be inferred from these statements of the trial judge that he was in anywise penalizing the defendants for any past delinquencies of Jordan's brother. The trial judge was simply noting that a fine in a similar case had, in the past, proven ineffective as a deterrent.

Implicit in the court's remarks is Jordan's knowledge of the previous involvement of his brother and his co-defendant in a similar offense. It is well settled that a trial judge, in passing sentence, may express his appraisal of the conduct of the defendant before him. *Montgomery v. United States,* 10 Cir., 344 F.2d 955; *Simmons v. United States,* 3 Cir., 302 F.2d 71.

The granting or denial of probation is within the discretion of the trial court and will not be reviewed absent a showing of abuse of discretion. *Humes v. United States,* 10 Cir., 186 F.2d 875; *Yates v. United States,* 10 Cir., 308 F.2d 737; *Thomas v. United States,* 10 Cir., 327 F.2d 795. There is no showing that the trial court was arbitrary or capricious or that he was motivated by improper considerations. The sentence is within the statutory limit and will not be disturbed. *Jones v. United States,* 10 Cir., 323 F.2d 864; *McMurray v. United States,* 10 Cir., 298 F.2d 619; *Smith v. United States,* 10 Cir., 273 F.2d 462.

AFFIRMED.